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C.P.

United States  
Circuit Court of Appeals

For the Ninth Circuit

—  
PACIFIC MIDWAY OIL COMPANY, a Cor-  
poration,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

—  
Transcript of Record


Upon Appeal from the United States District Court  
for the Northern District of California,  
Southern Division.

—  
FILED

JUL 28 1932

PAUL P. O'BRIEN,

CLERK



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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

GEO. J. HATFIELD, U. S. Attorney.

ESTHER B. PHILLIPS, Asst. U. S. Attorney,  
Post Office Building, San Francisco, California.  
Attorneys for Plaintiff and Appellee.

O. R. FOLSOM-JONES,

WILLIAM BRESNAHAN, 580 Market Street,  
San Francisco, California.  
Attorneys for Defendant and Appellant.

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia, Second Division.

No. 18,306-K.

THE UNITED STATES,

Plaintiff,

vs.

PACIFIC MIDWAY OIL COMPANY, a Cor-  
poration,

Defendant.

COMPLAINT.

The above-named plaintiff, for a cause of action  
against the defendant, alleges as follows:

I.

At all times hereinafter mentioned the plaintiff  
was and now is a corporation sovereign and body  
politic.

## II.

At all times hereinafter mentioned the defendant was and now is a corporation duly authorized, created and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco and in the Southern Division of the Northern District of California; that the residence and principal place of business of said defendant is in the said City and County and district as aforesaid, to wit, at Room 819 Mills Building, Corner of Montgomery and Bush Streets, therein. [1]\*

## III.

On the 26th day of February, 1918, defendant filed with the then Collector of Internal Revenue its income and profits tax return for the year 1917, from which it appeared that the defendant realized no net taxable income for said year; that on the 23d day of April, 1921, defendant filed an amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was \$1,613.90 and the tax due thereon was \$96.84; that said tax was paid to the Collector of Internal Revenue for the First District of California at the time of the filing of the return; that on August 14, 1924, defendant filed a second amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was \$3,273.15 and the tax due thereon

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.



was \$196.39. Defendant having paid \$96.84, an indicated balance of \$99.55 was shown to be due, which was neither assessed by the Commissioner of Internal Revenue nor paid by the defendant. In March 1923, after an examination and audit of defendant's 1917 income tax returns, the Commissioner of Internal Revenue made an additional assessment of tax against the defendant in the sum of \$5,076.32, which liability was adjusted as hereinafter set forth.

#### IV.

On April 15, 1919, defendant filed its income and profits tax returns for the year 1918, from which it appeared that defendant had realized no taxable income for said year. On April 23, 1921, defendant filed an amended income and profits tax return for said year, from which it appeared that defendant's net taxable income was \$37,613.69 and the tax due thereon was \$10,066.74 which was paid to the Collector of Internal Revenue for the First District of California at the time of filing the return. On August 14, 1924, defendant filed a second amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was \$3,718.36 and the tax [2] due thereon was \$206.20, indicating an overpayment of \$9,860.54.

#### V.

On February 5, 1920, defendant filed its income and profits tax return for the year 1919, from which

it appeared that defendant had realized no taxable income for said year. On April 23, 1921, defendant filed an amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was \$46,803.14 and the tax due thereon was \$7,480.58. Said tax was paid to the Collector of Internal Revenue for the First District of California on the date of the filing of said amended return. On August 14, 1924, defendant filed a second amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was \$4,919.55 and the tax due thereon \$291.96, indicating an overpayment of \$7,188.62.

## VI.

On March 15, 1921, defendant filed its income and profits tax return for the year 1920, from which it appeared that its net taxable income for said year was \$36,849.30 and the tax due thereon was \$1644.39, which tax was paid to the Collector of Internal Revenue for the First District of California at the time of filing the return. On August 14, 1924, defendant filed an amended income and profits tax return, from which it appeared that defendant's net taxable income for said year was \$200,846.72 and the tax due thereon \$63,304.47, of which \$1644.39 had been paid, indicating an underpayment of \$61,660.08. Said underpayment of tax was neither assessed by the Commissioner of Internal Revenue nor paid by the defendant. On January 22, 1927, after an examination and audit

of defendant's returns for said year and the filing of a waiver by the defendant of its right to appeal to the Board of Tax Appeals and its consenting to the assessment of the deficiency, the Commissioner of [3] Internal Revenue made an additional assessment of tax against the defendant in the sum of \$86,577.19 together with interest in the sum of \$3,676.56.

## VII.

On March 7, 1922, defendant filed its income and profits tax return for the year 1921, from which it appeared that its net taxable income for said year was \$143,072.68 and the tax due thereon \$56,470.53, which tax was paid to the Collector of Internal Revenue for the First District of California as follows:

March 7, 1922	\$14,117.63
June 15, 1922	14,117.63
September 15, 1922	14,117.63
December 14, 1922	14,117.64

On August 4, 1926, the Commissioner of Internal Revenue, after an examination and audit of defendant's 1921 return, allowed an overassessment in favor of the defendant in the sum of \$14,256.56. Of said amount \$5,076.32 was credited against the additional assessment of tax against the defendant for the year 1917 in said amount, \$9,180.24 was refunded with interest on said amount in the sum of \$200,750.00, computed as follows: Interest on \$9,041.32 from December 14, 1922, the date of over-

payment, to August 4, 1926, the date of the allowance of the refund, and on \$138.92 from September 15, 1922, the date of the overpayment, to August 4, 1926, the date of the allowance of the refund.

### VIII.

On November 10, 1926, the Commissioner of Internal Revenue notified the defendant that an audit of its income tax returns for the years 1917 to 1920, inclusive, had resulted in the determination of a deficiency in tax of \$86,577.19 for the year 1920 and an aggregate overassessment of \$22,025.93 for the years 1917, 1918 and 1919. Defendant was also notified that it was granted thirty days from the date of the letter within which to protest the proposed deficiency in tax. [4]

### IX.

On December 31, 1926, the Commissioner of Internal Revenue, in a letter, notified the defendant of the above determination of deficiency and over-assessments and allowed the defendant sixty days within which to file a petition with the Board of Tax Appeals for a redetermination of the deficiency. A copy of said letter is hereto attached, marked "Exhibit 1" and made a part hereof.

### X.

The defendant acquiesced in the determination of the Commissioner of Internal Revenue relative to the deficiency in tax of \$86,577.19 for the year 1920 by the filing of a waiver of its right to file a

petition with the United States Board of Tax Appeals and consenting to the assessment and collection of the deficiency in tax aggregating \$86,577.19, a copy of which is hereto attached, marked "Exhibit 2" and made a part hereof.

## XI.

On January 31, 1927, the Commissioner of Internal Revenue allowed and scheduled to the Collector of Internal Revenue the following over-assessments in favor of the defendant:

1917	\$4,976.77
1918	9,860.54
1919	7,188.62

Of the overassessment of \$4976.77, the entire amount was erroneously refunded together with interest in the sum of \$146.51 computed on said amount from August 4, 1926, to January 31, 1927. On June 15, 1927, further interest was allowed and paid on said overassessment in the sum of \$1,086.70 computed from December 14, 1922, to January 31, 1927.

The entire amount of the overassessment of \$9,860.54 for the year 1918 was erroneously refunded together with interest thereon in the sum of \$3,416.47 computed from April 22, 1921, the date of the overpayment, to January 31, 1927, the date of the allowance of the refund. [5]

Of the overassessment of \$7188.62 for the year 1919, \$5253.75 was credited: \$1577.19 against the balance of defendant's underpayment for the year

1920 and \$3676.56 against interest due the United States from the defendant on its underpayment of tax; and \$1934.87 was erroneously refunded with interest in the sum of \$670.39 computed from April 22, 1921, to January 31, 1927.

## XII.

On February 10, 1927, the Collector of Internal Revenue for the First District of California applied as a credit against the additional assessment of \$86,577.19 the sum of \$85,000.00 paid to the Collector of Internal Revenue for said district in advance of the additional assessment by the Commissioner of Internal Revenue on January 22, 1927.

## XIII.

On February 17, 1928, the Commissioner of Internal Revenue allowed an overassessment in favor of the defendant for the year 1920 in the sum of \$7490.84; the amount of said overassessment was arrived at as follows:

	Tax	Interest
Total previously assessed	\$88,221.58	\$3,676.56
Total tax liability	76,829.78	3,192.80
Overassessment indicated	<u>\$11,391.80</u>	<u>\$ 483.76</u>
Total tax and interest	\$11,875.56	
Less: Amount withheld for adjustment in connection with suit for recovery of an erroneous allowance of interest for the years 1917, 1918 and 1919		4,384.72
Net overassessment	<u>\$ 7,490.84</u>	

The entire amount of said net overassessment was refunded to the defendant with interest in the sum of \$458.06 computed from February 10, 1927, the date of the overpayment, to February 17, 1928, the date of the allowance of the refund. [6]

#### XIV.

Plaintiff alleges that the amounts of interest in the sums of \$146.51, \$3416.47 and \$670.39 for the years 1917, 1918 and 1919, respectively, and the further allowance of \$1086.70 for the year 1917 constituted an over-allowance of interest and an erroneous and illegal refund of money to the defendant to the extent of \$4384.72 for the reason that the entire overassessments on which said interest allowances were computed should have been credited against the additional assessment against the defendant for the year 1920; that no interest

is allowable under Section 1116 of the Revenue Act of 1926 on the overassessments thus credited for the reason that the due date of the tax to which the credits were applied, March 15, 1921, is prior to the date of the payment of the taxes overassessed; that the amount of the erroneous refund of interest is arrived at as follows:

Additional tax for the year 1920		\$86,157.19
Less overassessments:		
1917	\$4,976.77	
1918	9,860.54	
1919	7,188.62	22,025.93
		<hr/>
Balance on which interest should have been assessed		\$74,131.26
		<hr/> <hr/>
Interest thereon		\$ 2,741.21
Interest assessed		3,676.56
		<hr/>
Interest erroneously assessed		\$ 935.35
Interest erroneously refunded		5,320.07
		<hr/>
Amount of interest to be recovered		\$ 4,384.72
		<hr/> <hr/> <hr/>

### XV.

On April 7, 1927, the Commissioner of Internal Revenue, after further examination and audit of defendant's 1921 return, allowed a further over-assessment in the sum of \$603.07 with interest thereon in the sum of \$165.11 computed from September 15, 1922, the date of payment, to April 7, 1927, the date of allowance. [7]



XVI.

Plaintiff alleges that the Commissioner of Internal Revenue made an error in the computation of defendant's tax for the year 1921 by which defendant was allowed an overassessment of \$14,256.56 and a further overassessment of \$603.07; that said error resulted in an erroneous and illegal refund to the defendant in the sum of \$1446.99; that a computation showing the manner in which the erroneous refund is determined is attached hereto, marked plaintiff's "Exhibit 3" and by reference made a part hereof.

XVII.

Plaintiff alleges that at the time of the making of the additional assessments of taxes against the defendant for the several years above referred to, the several assessments were made within the statutory period of limitation as extended by waivers duly filed and executed between the defendant and the Commissioner of Internal Revenue.

XVIII.

Defendant alleges that prior to the commencement of this action the Collector of Internal Revenue for and on behalf of the plaintiff demanded of the defendant that it pay the sums of \$4384.72 and \$1446.99 erroneously refunded and paid by the plaintiff to the defendant; that the defendant neglected and refused to pay the same.

## XIX.

The defendant, because of the erroneous refunds and illegal refunds made by the plaintiff to the defendant, as hereinbefore set forth, is indebted to the plaintiff in the sums of \$4384.72 and \$1446.99.

## XX.

The Commissioner of Internal Revenue and the Attorney General authorize the commencement of this suit.

WHEREFORE plaintiff demands judgment against the defendant for the sums of \$4384.72 and \$1446.99 together with interest and the costs of this action.

GEO. J. HATFIELD,  
United States Attorney. [8]

“EXHIBIT 1.”

Form NP-2.

Treasury Department  
Washington

IT:E:SM

December 31, 1926.

HHV-C-30438-60D

Pacific Midway Oil Company,  
822 Mills Building,  
San Francisco, California.

Sirs:

An audit of your income and profits tax returns for the years 1917, 1918, 1919 and 1920 has resulted in the determination of a deficiency in tax of \$86,-577.19 for 1920 and overassessments aggregating

\$22,025.93 for the years 1917, 1918 and 1919, as set forth in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D-HHV-C-30438. In the event that you acquiesce in a part of the determination, the

waiver should be executed with respect to the items to which you agree.

Respectfully,  
D. H. BLAIR,

Commissioner.

By (signed) C. R. NASH,  
Assistant to the Commissioner.

Inclosures:

Statement.

Form A. [9]

Statement

December 31, 1926

IT:E:SM-60D

HHV-C-30438

In re: Pacific Midway Oil Company,  
822 Mills Building,  
San Francisco, California.

Year	Deficiency	Overassessment
1917		\$ 4,976.77
1918		9,860.54
1919		7,188.62
1920	\$86,577.19	
Totals	\$86,577.19	\$22,025.93
Net deficiency		\$64,551.26

The details disclosing the above deficiency and overassessments were disclosed in Bureau letter dated November 10, 1926.

A copy of this letter has been furnished your authorized representative, Mr. William E. Hayes, Munsey Building, Washington, D. C. [10]

“EXHIBIT 2.”

In re: Pacific Midway Oil Company,  
822 Mills Building,  
San Francisco, California.

IT:E:SM:60D  
HHV-C-30438

FORM A

WAIVER OF RIGHT TO FILE A PETITION  
WITH THE U. S. BOARD OF TAX APPEALS.

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926 and consents to the assessment and collection of a deficiency in tax for the year 1920 aggregating \$86,577.19.

PACIFIC MIDWAY OIL CO.

(Name)

San Francisco, Calif.

(Address)

(Corporate seal to be affixed;  
if no seal, so state.)

By (Signed) B. S. NOYES,  
President.

Date January 24, 1927.

NOTE: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926. [11]

## "EXHIBIT 3."

1921

Net income reported	\$143,072.68
Deduct:	
1. Depletion allowed	25,543.25
	<hr/>
Net income adjusted	\$117,529.43

## Explanation of Change

1. Depletion has been allowed, based on the March 1, 1913 value and reserves which were established in conference held October 18, 1923. Article 201, Regulations 62.

Production	Rate	Depletion
92,384 barrels	.27649	\$25,543.25

## Invested Capital

Capital stock and surplus as at December 31, 1919, as adjusted in accordance with audit approved for 1920 and prior years,

	\$210,681.29
Add:	
1. 1920 adjusted taxable income	227,496.10
2. 1920 nontaxable income	3,612.56
3. Realized appreciation	111,963.14
	<hr/>
Total	\$553,753.09

## Deduct:

4. Dividends paid 1920	\$98,133.50	
5. Income tax due, 1917	196.39	
	1918	206.20
	1919	291.96
6. Income tax 1920		
\$76,829.78 prorated	32,468.27	
7. Dividends paid 1921		
in excess of earnings	220,189.85	351,486.17
	<hr/>	<hr/>
Invested capital adjusted		\$202,266.92

## Computation of Tax

Net income adjusted	\$117,529.43
Invested capital adjusted	\$202,266.92
Excess profits credit (8% of \$202,266.92 plus \$3,000.00)	19,181.35

[12]

Capital	Income	Credit	Balance	Rate	Tax
20%	\$40,453.38	\$19,181.35	\$21,272.03	20%	\$ 4,254.41
Balance	77,076.05		77,076.05	40%	30,830.42
	<hr/>	<hr/>	<hr/>		<hr/>
Totals	\$117,529.43	\$19,181.35	\$98,348.08		\$35,084.83
Net income			\$117,529.43		
Less:					
Interest not exempt		\$2,714.05			
Profits tax		35,084.83	37,798.88		
		<hr/>	<hr/>		
Balance taxable at 10%			\$79,730.55		7,973.06
					<hr/>
Total tax liability					\$43,057.89
Tax previously assessed			\$65,470.53		
Less:					
Overassessment allowed		\$14,256.56			
Overassessment allowed		603.07	14,859.63		41,610.90
		<hr/>	<hr/>		<hr/>
Amount due, representing erroneous allowance and refund					\$1,446.99
[Endorsed]:	Filed Dec. 26, 1928. [13]				

[Title of Court and Cause.]

### DEMURRER.

Defendant demurs to plaintiff's complaint on file herein on the following grounds:

#### I.

That said complaint does not state a cause of action;



II.

That said complaint is ambiguous for the following reasons:

(a) That in paragraph XIII thereof plaintiff admits having received from defendant the sum of Four Thousand Three Hundred Eighty-four and 72/100 Dollars (\$4,384.72), and in paragraph XVIII thereof alleges that defendant is indebted to the plaintiff in said sum, and in the prayer thereof prays judgment therefor.

(b) That in paragraph VII thereof it is alleged that Nine Thousand One Hundred Eighty and 24/100 Dollars (\$9,180.24) was refunded with interest on said amount in the sum of Two Hundred Thousand Seven Hundred and Fifty Dollars (\$200,750.00).

III.

That said complaint is uncertain for the same reasons that it is ambiguous as set forth in paragraph II hereof: [14]

IV.

That said complaint is unintelligible for the same reasons that it is ambiguous as set forth in paragraph II hereof.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed with costs of suit incurred herein.

MELVIN & SULLIVAN,

Attorneys for Defendant.

I hereby certify that the foregoing demurrer is not interposed for purposes of delay but in my opinion is well taken in point of law.

WM. J. DE MARTINI,  
One of the Attorneys for Defendant.

Receipt of a copy of the within Demurrer is hereby admitted this 7th day of February, 1929.

GEO. J. HATFIELD,  
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 7, 1929. [15]

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District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

Present: the Honorable FRANK H. KERRIGAN, District Judge.

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[Title of Cause.]

**ORDER OVERRULING DEMURRER.**

Ordered that the motion for an order and decree that plaintiff deposit with the clerk \$4,384.72, being the subject matter of suit, after argument by attorneys for the respective parties, be and the same is hereby denied. Further ordered that the demurrer herein, be and the same is hereby overruled, with leave to answer within ten days. [16]

[Title of Court and Cause.]

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED by and between the parties hereto that a jury may be and the same is hereby waived and that the above matter shall be tried by Court without a jury.

Dated, April 27, 1929.

GEO. J. HATFIELD,  
Attorney for Plaintiff.  
MELVIN & SULLIVAN,  
Attorneys for Defendant.

[Endorsed]: Filed Apr. 27, 1929. [17]

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[Title of Court and Cause.]

ANSWER.

Defendant herein answering plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph XI of plaintiff's complaint defendant denies that the entire or any amount of the overassessment of \$4,976.77 or any sum with interest in the sum of \$146.51 or any interest was erroneously refunded; denies that on June 15, 1927 or at any time further or any interest was allowed and/or paid on said overassessment in the sum of \$1,086.70 or any sum; denies that the entire or any amount of the overassessment of \$9,860.54 or any

sum for the year 1918 with interest thereon in the sum of \$3,416.47 or any interest was erroneously refunded; denies that \$1,934.87 or any sum with interest in the sum of \$670.39 or any interest was erroneously refunded.

## II.

Answering paragraph XII of plaintiff's complaint defendant alleges that it has not sufficient information or belief with which to answer the allegations of said paragraph and basing its denial on said ground denies each and every, all and singular, the allegations contained therein. Further answering paragraph XII defendant alleges that on November 10, 1926 defendant herein paid to the Collector of Internal Revenue for the First District of California, the sum of \$85,000.00 to be applied as credit against any deficiency in taxes that might be found by the Commissioner of Internal Revenue.

## III.

Answering paragraph XIII of plaintiff's complaint defendant alleges that it has not sufficient information or belief with which to answer the allegations of said paragraph and basing its denial on said ground denies each and every, all and singular, the allegations contained therein.

## IV.

Answering paragraph XIV defendant denies that amounts of interest in the sums of \$146.51, \$3,416.47

and \$670.39 or any interest and/or a further allowance of \$1,086.70 or any allowance or any sum constituted an over-allowance of interest and/or an erroneous and/or illegal refund of money to defendant to the extent of \$4,384.72 or any sum, and denies that there was any erroneous refund of interest.

V.

Answering paragraph XVI defendant denies that the Commissioner of Internal Revenue made an error in the computation of defendant's tax for the year 1921 or any year; denies that the alleged error resulted in an erroneous and/or illegal refund to the defendant in the sum of \$1,446.99 or any sum; denies that the computation incorporated in plaintiff's complaint and known as Exhibit 3 is a correct computation and on this behalf alleges that it was erroneous.

VI.

Answering paragraph XVII defendant denies that the several assessments mentioned in plaintiff's complaint were made within the statutory period of limitation.

VII.

Answering paragraph XVIII defendant denies that prior to the commencement of this action or at any time the Collector of Internal Revenue or anyone for and/or on behalf of the plaintiff demanded of defendant that it pay the sums of \$4,384.72

and/or \$1,446.99 or any sum and denies that the defendant neglected and/or refused to pay the same.

### VIII.

Answering paragraph XIX defendant denies that it is indebted to plaintiff or anyone in the sums of \$4,384.72 and/or \$1,446.99 or any sum.

WHEREFORE, defendant prays that plaintiff take nothing by its complaint.

MELVIN & SULLIVAN,

Attorneys for Defendant.

State of California,

City and County of San Francisco.—ss.

E. S. Noyes, being first duly sworn, deposes and says:

That he is an officer, to-wit: President of the defendant corporation, and that he makes this verification for and on behalf of said corporation and that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

B. S. NOYES.

Subscribed and sworn to before me this 10th day of April, 1929.

[Seal]

HALLIE L. LANFAR,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer by copy admitted this 10 day of Apr. 1929.

GEO. J. HATFIELD,  
Attorney for.....

[Endorsed]: Filed Apr. 10, 1929.

United States of America  
Northern District of California.—ss.

CERTIFICATION.

I, WALTER B. MALING, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Answer, filed April 10, 1929 in the case entitled *The United States vs. Pacific Midway Oil Company*, No. 18306-K, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif., this 20th day of May, A. D. 1932.

[Seal]

WALTER B. MALING,  
Clerk.

By LYLE S. MORRIS,  
Deputy Clerk.

[Title of Court and Cause.]

AMENDED ANSWER AND COUNTERCLAIM.

Comes now the defendant in the above entitled action, and by leave had and obtained, makes and files its Amended Answer and Counterclaim to the Complaint in the above entitled action, and admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of the complaint.

II.

Admits the allegations of paragraph II of the complaint.

III.

Admits the allegations of paragraph III of the complaint.

IV.

Admits the allegations of paragraph IV of the complaint.

V.

Admits the allegations of paragraph V of the complaint.

VI.

In answer to paragraph VI of the complaint the defendant admits all the plaintiff's allegations therein, except the allegation relating to an additional assessment of \$86,577.19 alleged to have been made on January 22, 1927, and the allegation relating to



an underpayment of \$61,660.08, as to which allegations the defendant does not have sufficient knowledge or information upon which to form a belief, and, therefore, denies the same.

VII.

Answering paragraph VII of the complaint, the defendant admits all allegations contained therein, except the allegation that interest in the sum of \$200,750 was paid to the defendant on a refund of \$9,180.24, which allegation [18] the defendant denies.

VIII.

Answering paragraph VIII of the complaint, the defendant admits that the Commissioner of Internal Revenue, on November 10, 1926, in Washington, D. C., addressed a letter to the defendant at San Francisco, California, advising that an audit of its income tax returns for the years 1917 to 1920, inclusive, disclosed an additional tax of \$86,577.19 for the year 1920 and overassessments aggregating \$22,025.93 for the years 1917, 1918 and 1919; but plaintiff denies such letter constituted a determination of a deficiency for 1920, or that it received the letter prior to November 17, 1926.

IX.

Admits the allegations of paragraph IX of the complaint.

X.

Answering paragraph X of the complaint, the defendant admits the signing of the waiver therein

referred to, but denies that it acquiesced in the determination of the Commissioner of Internal Revenue, and further denies that on January 24, 1927, or at any time subsequent to November 10, 1926, there was any deficiency for the year 1920.

### XI.

Answering paragraph XI of the complaint, the defendant admits that overassessments were allowed and scheduled on the date and in the amounts alleged for the years 1917, 1918 and 1919; admits that the overassessment for 1917 was refunded with interest as alleged, but denies that such refund of tax or interest was erroneous; admits that the overassessment for 1918 was refunded with interest as alleged, but denies that such refund of tax or interest was erroneous; admits that \$1,577.19 of the overassessment for 1919 was credited against an alleged underpayment of taxes for 1920, that \$3,676.56 [19] of the 1919 overassessment was credited against interest alleged to be due for 1920, and that the balance of the 1919 overassessment was refunded with interest as alleged, but denies that there was any underpayment of tax or interest for 1920 at the time these alleged credits were made, and further denies that the refund of the balance of overassessment and interest was erroneous.

### XII.

Answering paragraph XII of the complaint, the defendant alleges that it has not sufficient information on which to form a belief, and on that ground

denies each and every allegation contained therein. Further answering paragraph XII, the defendant alleges that on November 10, 1926, the defendant paid to the Collector of Internal Revenue for the First District of California the sum of \$85,000.00 on account of taxes for the year 1920, which payment made a total payment of \$86,644.39 for the year 1920, an amount which was at least \$9,814.61 in excess of the defendant's total tax liability for the year 1920.

### XIII.

Answering paragraph XIII of the complaint, the defendant admits that the Commissioner of Internal Revenue determined that the total tax liability of the defendant for the year 1920 was \$76,829.78, and that the defendant had overpaid its taxes for that year in the amount of \$11,391.80, and that it had paid excess interest in the sum of \$483.76 on its 1920 taxes. The defendant further admits that the defendant thereafter received from the plaintiff, on account of the aforesaid overassessment of \$11,875.56 tax and interest, the sum of \$7,490.84 together with interest thereon in the sum of \$458.06. The defendant further admits that the plaintiff withheld from the amount of said overassessment of [20] tax and interest the sum of \$4,384.72.

### XIV.

Answering paragraph XIV of the complaint, the defendant denies that any allowance of interest as alleged was erroneous or illegal or that it consti-

tuted an overallowance of interest as alleged, and denies that there was any erroneous refund of interest. Further answering paragraph XIV defendant denies that on January 31, 1927, the date on which the Commissioner of Internal Revenue allowed the overassessments for the years 1917, 1918 and 1919, there was outstanding any unpaid tax for the year 1920.

#### XV.

Admits the allegations of paragraph XV of the complaint.

#### XVI.

Answering paragraph XVI of the complaint, the defendant denies that the Commissioner of Internal Revenue made an error in the computation of defendant's tax for the year 1921 or any year. The defendant further denies that the computation incorporated in plaintiff's complaint as Exhibit 3 is a correct computation, and on this behalf alleges that it is erroneous.

#### XVII.

Answering paragraph XVII of the complaint, defendant denies that the several assessments mentioned in plaintiff's complaint were made within the statutory period of limitation.

#### XVIII.

Answering paragraph XVIII of the complaint, defendant alleges that the defendant does not have sufficient knowledge or information upon which to

form a belief and, therefore, denies the allegations contained therein.

### XIX.

Answering paragraph XIX of the complaint, defendant [21] denies that it is indebted to plaintiff as alleged.

For further answer to the said complaint by way of counterclaim the defendant alleges:

#### I.

In adjusting the 1919 overassessment of \$7,188.62 the Commissioner of Internal Revenue credited \$3,676.56 of this amount against interest alleged to be due the United States for the year 1920. No interest was allowed or paid to the defendant on the amount thus credited. The defendant is entitled to interest at the rate of six per centum per annum on the \$3,676.56 from the date the amount was paid on April 23, 1921, to January 31, 1927, amounting to \$1,274.00. The plaintiff has refused to allow or pay such interest, notwithstanding demand therefor has been made by the defendant.

#### II.

On February 17, 1928, the Commissioner of Internal Revenue, acting on a claim for refund duly filed by the defendant, determined that defendant had overpaid its income and profits taxes for the year 1920 in the sum of \$11,391.80, and had paid excess interest for 1920 in the sum of \$483.76. An overassessment in the amount of \$11,875.56 was allowed on that date.

## III.

On February 17, 1928, there was no income, war-profits or excess profits tax or installment thereof then due from the defendant.

## IV.

On or about February 17, 1928, the Commissioner of Internal Revenue refunded to the defendant, from the 1920 overassessment of tax and interest determined as set out above, the sum of \$7,490.84 with interest thereon in the sum of [22] \$458.06. The balance of the overassessment of tax and interest, amounting to \$4,384.72, was withheld from the defendant by the Commissioner in satisfaction of interest alleged to have been erroneously paid to the defendant and which is sued for in this action.

## V.

The Commissioner of Internal Revenue made an error in the computation of interest due the defendant on the amount of \$7,490.84 refunded to the defendant on February 17, 1928. The correct amount of interest is \$543.32 and the defendant is entitled to a further payment of interest in the sum of \$85.26. The plaintiff has refused to pay the defendant any additional interest on this refund, notwithstanding demand therefor has been made by the defendant.

## VI.

The action of the Commissioner of Internal Revenue in withholding the sum of \$4,384.72 from

the defendant was erroneous and illegal. The defendant is entitled to refund of this sum with interest as provided by law from November 10, 1926. The plaintiff has refused to refund to the defendant the amount withheld, notwithstanding demand therefor has been made by the defendant.

WHEREFORE, the defendant prays that the plaintiff take nothing by this action, and that judgment be entered for the defendant for the sums of \$1,274.00, \$85.26 and \$4,384.72 with interest thereon as provided by law, and its costs of this action.

JOSEPH D. BRADY,

Counsel for Defendant.

c/o Brewster & Ivins, 1369 Russ Building, San  
Francisco, California.

BREWSTER & IVINS,

815 Fifteenth St., N. W., Washington, D. C.

Of Counsel.

Service admitted, GEO. J. HATFIELD, by  
ESTHER B. PHILLIPS, Jan. 19, 1931.

[Endorsed]: Filed Jan. 19, 1931. [23]

[Title of Court and Cause.]

MEMORANDUM OPINION.

Before KERRIGAN, District Judge.

GEORGE J. HATFIELD, United States District Attorney and MISS ESTHER B. PHILLIPS, Assistant United States Attorney, Counsel for Plaintiff.

JOSEPH D. BRADY and F. E. YOUNGMAN, of San Francisco, California, Counsel for Defendant.

Two of the matters disputed in this case have been eliminated from consideration by concessions of the Government: it has abandoned its contention that there was an illegal refund on the overassessment of the defendant's tax for 1921; it has conceded that a credit of \$85.26 should be allowed defendant upon the computation of interest upon its 1920 deficiency.

The sole question then is: should the Collector of Internal Revenue have credited the overpayments of the defendant's taxes for 1917, 1918 and 1919 against its deficiency of \$86,557.19 for the year 1920 which would have necessitated a refusal to refund the overpayments with interest? The Government's contention that he should have done so appears to be supported by the authorities construing the sections of the law on set-off of overpayments against deficiencies and on the allowance of interest upon deficiencies and overpayments. [24]



The only difficulty in this case arises from the fact that the sum of \$85,000 was paid by the defendant to the Collector upon November 10, 1926 to be applied upon its 1920 deficiency. This was the same day that notice was mailed from Washington to defendant advising it of the respective overpayments and the deficiency. Subsequently this sum was applied to the deficiency leaving a balance of \$1,577.19 with interest on the deficiency from February 26, 1926, amounting to \$3,676.56. The total of these amounts was considered by the Collector to be the amount of tax "then due" under the terms of the section on set-off (Revenue Act of 1926, Sec. 284a) and was the only sum deducted from the overpayments to be refunded. As a result the balance of the overpayments with interest thereon from the respective dates of overpayment was paid to the taxpayer; the payment of this interest was improper. Had the Collector not applied the payment of \$85,000 to the deficiency, he would have set off the full amount of the overpayments against the deficiency, leaving a balance of \$64,531.26 with interest payable from February 26, 1926 under the terms of Sec. 283d of the Revenue Act of 1926.

The authorities hold that there shall be no refund of overpayments to the taxpayers unless there is a net balance in favor of the taxpayer on the theory that "any other interpretation would permit the taxpayers \* \* \* to exact from the government interest when the net balance was against him."

McCarl vs. Leland, 42 Fed. 2nd. 346; Tull and Gibbs vs. U. S. (C. C. A. 9) 48 Fed. 2nd. 148. This rule was applied in the McCarl case where the determination of the deficiency was pending on appeal and in the Tull and Gibbs case where the amounts of the deficiencies had not been ascertained but where it was known that there were deficiencies. The courts have given weight to the fact that the statutes require the [25] government to pay interest on overpayments from the date they were made while it can only collect interest on deficiencies from February, 1926. Two cases consider the effect of a tender of the deficiency. In Lucas vs. Blackstone, 45 Fed. 2nd. 291, it was held that a tender was properly refused by the Commissioner when there had been overpayments by the taxpayer even though the overpayments had not been scheduled until after the tender. The case of York Safe & Lock Co. vs. U. S., 40 Fed. 2nd. 148, expressly leaves open the situation where, as in this case, the payment was made after notice of the determination of the deficiency but before the determination became final. It is immaterial that the notice was not actually received until after the tender. Evidently the taxpayer had a representative in Washington who was keeping it advised of the progress of its matters pending before the Commissioner and who did advise the taxpayer of the fact of the determination the day the notice was sent out. It seems to be the rule that if the payment of the deficiency is made under such circumstances that the Court believes

it was made to defeat the government's right to set-off overpayments against deficiencies and thus require the payment of interest upon overpayments, such payment should be applied only to the *net balance of the deficiency*. The government is therefore entitled to the interest improperly paid. Since this money is now in the hands of the government, having been withheld upon a subsequent adjustment of an overassessment, the government is only entitled to interest from the date of its payment to the taxpayer to the date of such subsequent adjustment.

According to the suggestion in *Parker vs. St. Sure* decided by the Circuit Court of Appeals for the Ninth Circuit on October 26, 1931 (see Supplement to Manual of Federal Appellate Procedure by Paul P. O'Brien, pp. 5 and 6) this opinion [26] is adopted by me as my findings of fact and conclusions of law. In order that the defendant's record on appeal may be further protected, defendant's motion for special findings is denied; exception noted.

Let judgment be entered in accordance with the principles stated in this opinion in favor of the United States with costs.

Dated this 31st day of December, 1931.

KERRIGAN,  
District Judge.

[Endorsed]: Filed Dec. 31, 1931. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [27]

In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 18,306-K.

THE UNITED STATES,

Plaintiff,

vs.

PACIFIC MIDWAY OIL COMPANY, a corpo-  
ration,

Defendant.

### JUDGMENT.

This cause having come on regularly for trial on the 19th day of January, 1931, before the Court sitting without a jury, a jury having been waived by written stipulation filed; Esther B. Phillips, Assistant United States Attorney, appearing as attorney for plaintiff, and Joseph D. Brady, Esquire, appearing as attorney for defendant and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having rendered his decision, and ordered that judgment be entered in accordance therewith as hereinafter set forth.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is hereby ordered, adjudged and decreed by the Court that

plaintiff do have and recover of and from the defendant the sum of \$3495.28 without interest and its costs herein expended as may be taxed.

Dated, San Francisco, California, January 28th, 1932.

FRANK H. KERRIGAN,  
United States District Judge.

[Endorsed]: Filed and entered Jan'y 28, 1932.  
[28]

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[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 19th day of January, 1931, the above-entitled cause came on for trial before the Court sitting without a jury, a jury having been waived by stipulation, between the parties, and thereafter the following proceedings took place:

GEORGE J. HATFIELD, Esq., United States Attorney for the Northern District of California, and Miss ESTHER PHILLIPS, Assistant United States Attorney for said District, appearing for the plaintiff, and JOSEPH D. BRADY, Esq., appearing for the defendant.

Thereupon an opening statement was made in behalf of the plaintiff and an opening statement was made in behalf of defendant.

Miss PHILLIPS. I would like to offer in evidence a certified copy of the assessment list dated

January 22, 1927, which contains the assessment of the tax for the year 1920.

Mr. BRADY. No objection to that.

(The document, being a duly certified copy of "Commissioner's Assessment List," dated January 22, 1927, showing an assessment for the year 1920 of \$86,577.19 tax and \$3676.56 interest, was received in evidence and marked Plaintiff's Exhibit "1".)  
[29]

Miss PHILLIPS.—I would like to offer in evidence the certificate of overassessment showing the allowance made on account of interest for the years 1917, 1918, 1919, 1920 and 1921 and ask that they be marked U. S. Exhibits 2, 3, 4, and 5 respectively.

Mr. BRADY.—No objection to that.

(These documents, which are described hereafter, were received in evidence and marked Plaintiff's Exhibits 2, 3, 4, and 5, respectively.)

Exhibit "2," being a duly certified copy of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue with an attached copy of a letter dated June 1, 1927, directed to the Pacific Midway Oil Company, signed, C. R. Nash, Assistant to Commissioner of Internal Revenue, showing an allowance of interest on account of an overassessment of tax for the year 1917 in the amounts of \$146.51 and \$1,086.70.

Exhibit "3," being a duly certified copy of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue, showing an allow-

ance of interest on account of an overassessment of tax for the year 1918 in the amount of \$3,416.47.

Exhibit "4," being a duly certified copy of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue, showing an allowance of interest on account of an overassessment of tax for the year 1919 in the amount of \$670.39.

Exhibit "5," being a duly certified copy of a letter, dated December 31, 1926, directed to the Pacific Midway Oil Company, signed, D. H. Blair, Commissioner of Internal Revenue, stating that a determination of tax liability had been made for the years 1917 to 1920, inclusive, and that an appeal therefrom to the United States Board of Tax Appeals might be filed within sixty days from the date of the letter. The following tabulation sets forth a summary of the determination: [30]

	Deficiency	Overassess- ment
1917	\$	4,976.77
1918		9,860.54
1919		7,188.62
1920	86,577.19	
Net deficiency		\$64,551.26.)

Miss PHILLIPS.—I offer in evidence the certificate of overassessment and letter dated, January 16, 1928.

(These documents, being duly certified copies of a "Certificate of Overassessment" issued by the Commissioner of Internal Revenue, showing an

overassessment of tax liability and interest for the year 1920 in the amount of \$11,875.56, with a notation that \$4,384.72, thereof, was "Amount withheld for adjustment in connection with suit for recovery of an erroneous allowance of Interest for the years 1917, 1918, and 1919," and that the balance of \$7,490.84 was refunded with interest in the amount of \$458.06, and a letter dated January 16, 1928, directed to the Pacific Midway Oil Company, signed by the Commissioner of Internal Revenue, notifying the company that its claim for refund for the year 1920 had been allowed in the manner set forth heretofore in describing the certificate of overassessment for the year 1920, were received in evidence and marked Plaintiff's Exhibit "6.")

Miss PHILLIPS.—I would like to offer a certified copy of the record of the Collector of Internal Revenue, showing the schedule of overassessment for the years 1917, 1918, 1919 and 1920.

(The document, being a certified copy of the record of the Collector of Internal Revenue, showing the schedule of overassessments for the years 1917, 1918, 1919 and 1920, was received in evidence and marked Plaintiff's Exhibit "7.")

#### TESTIMONY OF WILLIAM M. WALSH FOR PLAINTIFF.

WILLIAM M. WALSH, called as a witness for the plaintiff, [31] being first duly sworn, testified:

I am Deputy Collector of Internal Revenue. I have been such for ten years in the income tax



branch. I have with me the files showing the interest and refunds and overassessments for the Pacific Midway Oil Company for the years 1917 to 1920, inclusive. I have a tabulation of these, prepared in my office under my supervision. The Pacific Midway Oil Company tendered a check in the amount of \$85,000 in November, 1926, in advance of the Commissioner's final assessment of the deficiency tax for 1920. A suspense account is where money is held prior to allocating it to a certain account. If a payment of tax is tendered in advance of an assessment by the Commissioner, it is accepted, but it cannot be applied against any assessment. The check is immediately put in the bank and marked suspense account. The assessment against the Pacific Midway Oil Company for 1920 was received from the Commissioner, February 10, 1927. When the assessment was received, the payment of \$85,000 was then applied against it.

#### CROSS-EXAMINATION.

The records show that the check for \$85,000 was received on November 10, 1926, and the practice is to cash checks the same day. I recognize the collector's endorsement on the check that you show me, purporting to be a check of the Pacific Midway Oil Company, dated November 9, 1926, to the order of the Collector of Internal Revenue, San Francisco, California, in the amount of \$85,000. I would say the check cleared through the bank so that the Collector of Internal Revenue received credit for

it on November 12, 1926. My records show that the check was received on account of 1920 tax liability and ultimately applied to the 1920 tax liability. My records do not show that this check was rejected or returned to the defendant. [32]

Mr. BRADY.—I hand you a paper and ask you if you recognize it?

A. Yes.

Q. Describe it.

A. It is a form of receipt for the payment of \$85,000 on account of additional income tax for the year 1920.

Mr. BRADY.—If your Honor please, the defendant offers this receipt in evidence.

Miss PHILLIPS.—No objection.

(The document, being an acknowledgment by the Collector of Internal Revenue of the payment of \$85,000 by the Pacific Midway Oil Company to apply on its tax liability for the year 1920 and bearing the Collector's stamp of payment dated, November 10, 1926, was received in evidence and marked Defendant's Exhibit "A".)

Mr. BRADY.—I would like to put in some proof with respect to the allegations of the counter-claim unless Miss Phillips is prepared to admit the allegations of facts.

Miss PHILLIPS. I have not had time to go into that counter-claim. If you have your proof I suggest you put it in.

Mr. BRADY.—It is only as to one question of fact. In paragraph one of our counter-claim we

make this allegation, "In adjusting the 1919 over-assessment of \$7,188.62 the Commissioner of Internal Revenue credited \$3,606.56 of this amount against interest alleged to be due the United States for the year 1920. No interest was allowed or paid to the defendant on the amount thus credited." Now if this is a fact and Miss Phillips is prepared to admit it, we won't have to adduce any proof.

Miss PHILLIPS.—I would say that whatever allowances of interest were made by the Commissioner are shown by the exhibits that I put in evidence.

The COURT.—Do you wish to introduce in evidence that [33] summary.

Miss PHILLIPS.—Yes.

(The document being a summary prepared from the records of the Collector of Internal Revenue setting out the overassessments for the years 1917, 1918, 1919 and 1920, was received in evidence and marked Plaintiff's Exhibit "8.")

The COURT.—Let the record show this, before you introduced any evidence or attempted to introduce any evidence in your case that you moved for nonsuit.

Mr. BRADY.—We move for judgment for the defendant on the complaint and for judgment for the defendant on the counter-claim.

Miss PHILLIPS.—I move for judgment for plaintiff as prayed for in the complaint, and for judgment in favor of the plaintiff as against the

defendant's counter-claim, and ask for special findings.

Mr. BRADY.—Defendant moves for judgment for defendant on the complaint and for the defendant on the allegations of the counter-claim.

The COURT.—On the ground that the evidence is not sufficient to sustain a judgment in favor of the plaintiff. You have to state the grounds.

Mr. BRADY.—We move for judgment because the evidence is not sufficient to sustain a verdict in favor of the plaintiff, on the ground that the allegations of the plaintiff's complaint under the law applicable thereto, show that the plaintiff is not entitled to judgment, and further show that the defendant is entitled to judgment, and furthermore, the allegations of the plaintiff's complaint show under the law applicable thereto, that the defendant is entitled to judgment on the counter-claim.

The following stipulation in writing, signed by the par- [34] ties to this action, was filed February 25, 1931:

#### “STIPULATION FOR INTRODUCTION OF EVIDENCE.

It is hereby stipulated and agreed that a waiver of time for making assessment of income, excess profits, or war profits taxes for the year 1920 as hereto attached, was made and filed, and that said waiver may be considered as introduced into evidence upon the trial of the above entitled case.”

## INCOME AND PROFITS TAX WAIVER.

For taxable years prior to January 31, 1922.

In pursuance of the provisions of existing Internal Revenue Laws, Pacific Midway Oil Co., a taxpayer of San Francisco, Calif., and the Commissioner of Internal Revenue, hereby waive the time prescribed by law for making any assessment of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (years) 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board. [35]

PACIFIC MIDWAY OIL CO.,

Taxpayer.

(signed) B. S. Noyes, President.

(signed) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of

the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

The foregoing is a copy of the duly certified "Income and Profits Tax Waiver" attached to the stipulation.

Thereafter and on December 31, 1931, the court filed a "Memorandum Opinion" finding generally for the plaintiff and denying defendant's motion for special findings, and exception noted.

After the memorandum opinion was filed, the parties entered into the following stipulation:

**"STIPULATION UPON COMPUTATION  
OF JUDGMENT.**

It is hereby **STIPULATED** and **AGREED** that if the judgment herein is computed upon the principles enunciated by the court in his memorandum opinion rendered herein on December 31, 1931, the correct amount is \$3495.28.

It is **FURTHER AGREED** that the defendant by agreeing to this computation is not to be understood as stipulating to acceptance of the principles approved by the court.

Dated, January 29, 1932."

On January 28, 1932, judgment was entered in favor of plaintiff in the agreed sum of \$3495.28, with costs but without interest.

Defendant hereby excepts to the order of the court [36] denying defendant's request for special findings.

Defendant hereby excepts to the order of the court for judgment in favor of plaintiff and judgment in favor of plaintiff and against defendant on plaintiff's complaint.

Defendant hereby excepts to the order of the court for judgment in favor of plaintiff and against defendant on defendant's counter-claim.

The defendant, the Pacific Midway Oil Company, presents the foregoing as and for its bill of exceptions in the above-entitled cause and prays that the same may be settled, allowed, signed and filed as such.

O. R. FOLSOM-JONES,  
WM. BRESNAHAN,  
Attorneys for Defendant. [37]

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ORDER APPROVING AND SETTLING  
BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein and said bill of exceptions may be used by either party, plaintiff or defendant, upon any appeal taken by either party, plaintiff or defendant.

Dated, May 13, 1932.

FRANK H. KERRIGAN,  
United States District Judge.

IT IS STIPULATED that the foregoing bill of exceptions is true and correct and that the same may be settled and allowed by the court.

O. R. FOLSOM-JONES,  
WM. BRESNAHAN,  
Attorneys for Defendant.

GEO. J. HATFIELD,  
United States Attorney.

ESTHER B. PHILLIPS,  
Assistant United States Attorney,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 13, 1932. [38]

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[Title of Court and Cause.]

STIPULATION REGARDING BILL OF  
EXCEPTIONS AND EXHIBITS.

IT IS HEREBY STIPULATED by and between the plaintiff and defendant in the above entitled cause, and by their respective counsel, that the original exhibits, numbers 1 to 8, inclusive, of plaintiff, and Exhibit A for defendant, may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth District for use in connection with the appeal in this cause, now pending.



IT IS FURTHER STIPULATED AND AGREED that for the purpose of settling, signing and filing the bill of exceptions in the said case, the said exhibits need not be included in the said bill of exceptions but will be deemed to be incorporated therein.

Dated, May 5, 1932.

O. R. FOLSOM-JONES,  
WM. BRESNAHAN,  
Attorneys for Defendant.  
GEO. J. HATFIELD,  
ESTHER B. PHILLIPS.

Approved: May 7, 1932.

FRANK H. KERRIGAN,  
District Judge.

[Endorsed]: Filed May 7, 1932. [39]

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[Title of Court and Cause.]

PETITION FOR APPEAL AND ASSIGNMENT  
OF ERRORS.

To the United States District Court for the Northern District of California, Southern Division:

The Pacific Midway Oil Company, a corporation, defendant and counterclaimant in the above entitled action, by and through O. R. Folsom-Jones and William Bresnahan, its attorneys, feeling itself aggrieved by the judgment entered heretofore to wit, on the 28th day of January, 1932, in the above entitled

action, does hereby appeal from said judgment and from the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed and that a transcript of the record of proceeding upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And in connection with its petition for appeal herein and the allowance of same, said defendant assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment in favor of the United States on its complaint and the defendant's counter-claim and seeks judgment [40] against the United States and in favor of the defendant on its counter-claim herein, to wit:

### I.

That the court erred in making and entering judgment in favor of the plaintiff and against the defendant herein on its complaint and further erred in making and entering judgment in favor of the United States and against the defendant on the defendant's counter-claim upon each and all of the following grounds, to wit:

(a) On the ground that the evidence in the cause was such that the United States, the plaintiff, had not established any right of recovery against the defendant on plaintiff's complaint herein and

was insufficient as a matter of law to sustain a judgment in favor of plaintiff.

(b) On the ground that the evidence in the cause was such as a matter of law to entitle defendant to judgment against the plaintiff for the amount prayed for in its counter-claim and on all of the issues in the case.

(c) On the ground that the judgment was against the evidence.

(d) On the ground that the judgment was contrary to law.

## II.

The court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on plaintiff's complaint at the close of all the evidence in the cause upon each and all of the following grounds, to wit:

(a) On the ground that the evidence in the cause was such that the United States, the plaintiff, had not established any right of recovery against the defendant on plaintiff's complaint herein and was insufficient as a matter of law [41] to sustain a judgment in favor of plaintiff.

(b) On the ground that the evidence in the cause was such as a matter of law to entitle defendant to judgment against the plaintiff on its complaint and for the amount prayed for in defendant's counter-claim and on all of the issues in the case.

## III.

The court erred in overruling defendant's demurrer to the complaint upon each and all of the following grounds, to wit:

(a) The complaint failed to state a sufficient or any cause of action against the defendant.

(b) It affirmatively appeared from the allegations of the complaint that the plaintiff was not entitled to recover anything from the defendant by reason of the matters therein set forth and alleged.

(c) It affirmatively appeared from the complaint that prior to the commencement of the action, plaintiff had received from and been paid by the defendant the entire sum of money for which plaintiff prayed judgment against defendant in said action and that no money remained unpaid to plaintiff by reason of the matters set forth and alleged in said complaint.

## IV.

The court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on plaintiff's complaint at the close of all the evidence in the cause upon each and all of the following additional grounds, to wit:

(a) It appeared from the pleadings and evidence without contradiction that the sum of \$4384.72, said amount being the sum claimed by plaintiff from defendant in its complaint, was with-

held by the plaintiff from the amount of taxes the Commissioner of Internal Revenue determined to have been [42] overpaid by the defendant for the taxable year 1920; that the United States attempted to justify the withholding of said sum by asserting that there had been an excessive and erroneous overpayment of interest to defendant in the sum of \$4384.72 on refunds of taxes made for the years 1917, 1918 and 1919 and that said refunds should have been credited to an alleged underpayment in the tax liability of the defendant for the year 1920 without payment of any interest whatsoever.

(b) It further appeared from the pleadings and evidence without contradiction that the alleged tax liability of the defendant and interest incidental thereto for the taxable year 1920 was the sum of \$80,022.58 and no more; that there had been paid by the defendant on account of said tax liability and interest the sum of \$1644.39 on March 15, 1921 and the further sum of \$85,000.00 on November 10, 1926; that the refunds for the years 1917, 1918 and 1919, as aforesaid, were allowed by said Commissioner of Internal Revenue on January 31, 1927 and that as of said date of said allowance there existed no underpayment in the tax liability of the defendant for the year 1920 or any other year against which said refunds or any part thereof could have been credited.

(c) It further appeared from the pleadings and evidence that the action of the plaintiff and its Commissioner of Internal Revenue was illegal.

## V.

The Court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on defendant's counter-claim at the close of all the evidence in the cause upon each and all of the following grounds, to wit:

(a) On the ground that the evidence in the cause was such that the United States, the plaintiff, had not estab- [43] lished any defense to defendant's counter-claim and was insufficient as a matter of law to sustain a judgment in favor of the United States and against the defendant.

(b) On the ground that the evidence in the cause was such as a matter of law to entitle defendant to judgment against the plaintiff for the amount prayed for in its counter-claim and on all the issues in the case.

## VI.

The court erred in denying defendant's motion for judgment in favor of defendant and against plaintiff on defendant's counter-claim at the close of all the evidence in the cause upon each and all of the following additional grounds, to wit:

(a) Defendant incorporates herein by reference and makes a part hereof, subdivisions (a) and (b) of Paragraph IV hereof, hereinbefore set forth.

(b) It further appeared from the pleadings and evidence that the sum of \$3676.56 representing part of an overpayment of taxes for the taxable year

1919 allowed by the Commissioner of Internal Revenue on January 31, 1927, was applied by said Commissioner as a credit against interest alleged to be due from the defendant in the sum of \$3676.56 and assessed as a part of an alleged deficiency in tax for the year 1920, said deficiency having been assessed January 31, 1931.

(c) It further appeared that the tax assessed to defendant for the year 1919 concerning which the said Commissioner allowed said overpayment was originally paid on April 23, 1921, by defendant; that said overpayment remained overpaid from said date, April 23, 1921, to the date of said credit, to wit, January 31, 1927; that for the period of time between April 23, 1921, and January 31, 1927, the plaintiff failed to allow, pay or credit to the defendant any interest incidental to said overpay- [44] ment in the sum of \$3676.56 as required by law.

(d) It further appeared from the evidence that the action of the plaintiff and its Commissioner of Internal Revenue in not allowing defendant interest at the rate of six per centum per annum on said sum for the period April 23, 1921, to January 31, 1927, was illegal.

## VI.

The Court erred in refusing to make specific findings of the facts involved in this cause upon the ground that such findings were required to be made under the provisions of Section 764 of Title 28 of The United States Code.

WHEREFORE, defendant prays that its appeal be allowed, that a transcript of the proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that this assignment of errors be made a part of the record in the cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of January 28, 1932, may be reversed, annulled and held for naught; and further that it may be adjudged and decreed that said defendant and appellant have the relief prayed for in its counterclaim and such other relief as may be proper in the premises.

O. R. FOLSOM-JONES,  
WM. BRESNAHAN,

Attorneys for Defendant and Appellant.

[Endorsed]: Filed Apr. 21, 1932. [45]

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[Title of Court and Cause.]

#### ORDER ALLOWING APPEAL.

Upon reading the petition for appeal of the defendant and appellant herein and on motion of William Bresnahan, one of the counsel for defendant,

IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment hereto filed and entered herein be and the same is hereby allowed and that a certified transcript of the record, testimony, bill of



exceptions, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of \$250.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated, April 21st, 1932.

FRANK H. KERRIGAN,  
United States District Judge.

[Endorsed]: Filed Apr. 22, 1932. [46]

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[Title of Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL.

WHEREAS, PACIFIC MIDWAY OIL COMPANY has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a certain judgment rendered against said Pacific Midway Oil Company in said action in the above entitled Court and in favor of the United States of America, and entered herein on January 28, 1932.

NOW, THEREFORE, in consideration of the premises and of such appeal, the undersigned HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact a general surety business in the State of California, does hereby undertake and

promise on the part of Pacific Midway Oil Company, the appellants, that said appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding two hundred fifty dollars (\$250.00), to which amount it acknowledges itself bound.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the [47] above named District Court, may upon ten (10) days notice to the surety above named, proceed summarily in said proceedings to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of two hundred fifty dollars (\$250.00).

IN WITNESS WHEREOF, the said surety has caused these presents to be executed and its official seal attached by its duly authorized attorney-in-fact at San Francisco, California, the 20 day of April, A. D. 1932.

[Seal]

HARTFORD ACCIDENT AND  
INDEMNITY COMPANY,  
By DONALD MOLLBERG,

Attorney-in-Fact.

The premium on this bond is \$10.00 per annum.

State of California,  
City and County of San Francisco,—ss.

On this 20 day of April in the year one thousand nine hundred and thirty-two, before me, Vincent P. Laguens, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Donald Mollberg known to me to be the attorney-in-fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal]                          VINCENT R. LAGUENS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission will expire July 30, 1935.

Approved this .....day of ....., 19.....

FRANK H. KERRIGAN,  
Judge of District Court.

[Endorsed]: Filed Apr. 22, 1932. [48]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF  
RECORD.

To the Clerk of said Court:

Sir: Please prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit transcript of the record in the above-entitled cause for use on defendant's appeal herein and include therein the following:

1. Complaint.
2. Demurrer to complaint.
3. Order overruling demurrer.
4. Stipulation waiving jury.
5. Amended answer, and counter-claim.
6. Memorandum opinion.
7. Judgment.
8. Bill of exceptions and order settling same.
9. Petition for appeal and assignment of errors.
10. Stipulation regarding bill of exceptions and exhibits.
11. Order allowing appeal and fixing bond.
12. This praecipe.
13. Bond on appeal.

O. R. FOLSOM-JONES,  
WM. BRESNAHAN,  
Attorneys for Defendant.

Due Service admitted May 12, 1932.

ESTHER B. PHILLIPS,  
Ass't U. S. Attorney.

[Endorsed]: Filed May 13, 1932. [49]

[Title of Court and Cause.]

CERTIFICATE OF CLERK UNITED STATES  
DISTRICT COURT TO TRANSCRIPT OF  
RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 49 pages, numbered from 1 to 49, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$10.10; that the said amount was paid by the defendant and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 18th day of May, A. D. 1932.

[Seal]

WALTER B. MALING,

By B. E. O'HARA,

Deputy Clerk, United States District Court for the  
Northern District of California. [50]

## CITATION.

United States of America,—ss.

The President of the United States of America, to  
THE UNITED STATES OF AMERICA, and  
to GEORGE J. HATFIELD, United States  
Attorney for the Northern District of Cali-  
fornia, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Pacific Midway Oil Company, a corporation, is defendant and appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 21st day of April, A. D. 1932.

FRANK H. KERRIGAN,  
United States District Judge. [51]

Service of the within citation on appeal is hereby accepted this 22d day of April, 1932.

GEO. J. HATFIELD,  
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 22, 1932. Walter B. Maling, Clerk. By B. E. O'Hara, Deputy Clerk.

[Title of Court and Cause.]

ORDER REGARDING ORIGINAL EXHIBITS.

Upon stipulation of counsel in the above entitled cause for the omission of the original exhibits introduced at the trial of said cause from the printed record,

IT IS ORDERED that all said exhibits may be deemed to be included in the bill of exceptions and may be omitted from the printed record on appeal.

Dated, May 19, 1932.

CURTIS D. WILBUR,  
United States Circuit Judge.

## STIPULATION AS TO ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED and AGREED between counsel for the respective parties that all original exhibits introduced at the trial of above-entitled cause may be deemed to be included in the bill of exceptions and may be omitted from the printed record on appeal.

Dated, May 19, 1932.

O. R. FOLSOM-JONES,

WM. BRESNAHAN,

Counsel for Defendant.

GEO. J. HATFIELD,

United States Attorney,

By ESTHER B. PHILLIPS,

Assistant United States Attorney,

Counsel for Plaintiff.

[Endorsed]: Filed May 20, 1932.

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[Endorsed]: No. 6849. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Midway Oil Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 18, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.